

Li (Migration) [2021] AATA 2466 (21 April 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Guoliang Li
CASE NUMBER:	1804658
HOME AFFAIRS REFERENCE(S):	BCC2016/548958
MEMBER:	Meena Sripathy
DATE:	21 April 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 21 April 2021 at 3:15pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – applicant departed Australia – applicant and sponsor are not living together – applicant failed to provide requested information – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5F, 65, 359, 360, 363
Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221*

CASES

*Hasran v MIAC [2010] FCAFC 40
He v MIBP [2017] FCAFC 206*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 5 February 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied on the evidence provided that the applicant and sponsor were in a spouse relationship.
4. Since the matter has been before the Tribunal, movement records before the Tribunal indicate the applicant departed Australia on 2 September 2019 and has remained outside the country since then. Movement records indicate the sponsor is in Australia.
5. On 1 April 2021 the Tribunal wrote to the applicant and provided particulars of this information, explaining that together with the limited evidence to support the existence of an ongoing relationship, the Tribunal would find that he and the sponsor are not in a relationship at this time and he would not meet cl. 820.221. It explained that if it made this finding it would affirm the decision under review. Earlier, on 11 March 2021 the Tribunal had written to the applicant to invite to him to provide information, evidence and submissions to support any claims to be in an ongoing relationship.
6. The invitation was sent to the last address provided in connection with the review and advised that, if the information or comments were not provided in writing by 15 April 2021, the Tribunal may make a decision on the review without taking further steps to obtain the information or comments and the review applicant would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.
7. To date the applicant has not responded to either of these invitations. In these circumstances, s.359C applies and pursuant to s.360(3) the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40. The Tribunal has decided to proceed to decision without taking further steps to obtain the information or comments.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The applicant lodged the visa application on for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa on 5 February 2016, on the grounds of being in a married relationship with an Australian citizen, Allyssa Hamad, who lodged a sponsorship in support of the application.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
12. Before the Department the following evidence was provided by the applicant in support of the existence of a relationship: Completed application and sponsorship forms; evidence of applicant (PRCH Passport) and sponsor's identity (Australian Birth Certificate); a letter from Westpac Banking Corporation, dated 21 March 2016, confirming that they opened a joint Westpac eSaver account at their Marrickville Branch; A letter from The Westpac Debit Card Team, dated 04 December 2017, addressed to the sponsor, Allyssa Hamad at her address; a Certificate of Registration for a Motor Vehicle registered in the applicant's name, dated 08 November 2011; A joint Residential tenancy agreement (pages 1,2 and 11 only), dated 15 March 2017, for the Burwood address; a completed Form 80 (personal particulars for assessment including character assessment); a National Police Certificate, dated 15 December 2017; a copy of Marriage Certificate, confirming that their marriage on 12 October 2015; personal statements from applicant and sponsor with regards to their relationship history; a Form 888 Statutory Declaration from supporting witness Simon Jiam Jia LEE; and photos.
13. The delegate refused the application on the basis of not being satisfied on the above mentioned evidence, that the relationship between the applicant and sponsor was genuine or ongoing.
14. As indicated above, on 11 March 2021, the Tribunal invited the applicant to provide further and updated evidence to support the existence of a spouse relationship. It also wrote to the applicant on 1 April 2021 to invite comments or response to the information that he had departed Australia in September 2019 and remained outside Australia since then, while the sponsor remained here. No response or further information has been provided to the Tribunal by the applicant since then to date.
15. In light of the above and in the absence of any further or updated evidence, the Tribunal is not satisfied the applicant and sponsor are in a genuine and ongoing relationship at this time. There is no evidence relating to financial, social, nature of the household or commitment of the parties to support a finding that they have a mutual commitment to a shared life to the exclusion of all others, have a genuine and continuing relationship as at this time. The evidence that the applicant is overseas and sponsor is in Australia indicates they are not living together and there is no evidence that this is not a permanent situation.

16. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl.821.221(1)(c).
17. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.820.221(2) or (3).
18. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

19. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Meena Sripathy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).